No. 92-1994

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

GEANA J. DUNKIN, DAVID L. SMITH,

Petitioners,

vs.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, before discovery is concluded, a monetary sanction pursuant to Rule 37 against counsel currently of record is immediately appealable as a collateral order by an attorney found by the district court to have engaged in harassment, "pettifoggery" and discovery abuse.

2. Whether this Court should review the factual finding of the Tenth Circuit Court of Appeals that Petitioners' appeals of the discovery abuse sanction orders were frivolous and thus subject to sanction, in light of the rule in the Tenth Circuit that such orders are not immediately appealable.

LIST OF PARTIES

The parties to the proceedings below were Petitioners Geana J. Dunkin and David L. Smith, and Respondents Louisiana-Pacific Corporation, James Beldin, Dan Dilworth and Douglas Eddins.[1]

Louisiana-Pacific Corporation does not have a parent company. Louisiana-Pacific Corporation's subsidiaries are Blue Skies Aviation, Inc., Ketchikan Pulp Company, Kirby Forest Industries, Inc., Louisiana-Pacific Corporation (W. Va.), Louisiana-Pacific Corporation de Mexico, S.A. de C.V., Louisiana-Pacific, S.A. de C.V., Louisiana-Pacific Foundation, Louisiana-Pacific International, Inc., Louisiana-Pacific Canada, Ltd., Louisiana-Pacific Trucking Company, Louisiana-Pacific Venture Corp., L-P Foreign Sales Corporation, and New Waverly Transportation, Inc. Louisiana-Pacific Corporation does not have any affiliate companies.

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1. Dan Dilworth was dismissed by the district court as a defendant by order dated May 28, 1992. Appendix to petition for certiorari at 101a (hereinafter "App."). Petitioners nonetheless named him as an appellee in the proceedings in the Tenth Circuit and have named him as a Respondent herein.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is not reported, and is reproduced at page 1a of the Appendix.

STATEMENT OF THE CASE

The case below is a routine employment discrimination case in which Petitioner-Plaintiff Geana J. Dunkin asserts claims pursuant to the Age Discrimination in Employment Act of 1967,

Title VII of the Civil Rights Act of 1964 (sex), and the Colorado Antidiscrimination Act (handicap), and several pendent state law claims. The complaint was filed well over a year ago, on February 7, 1992. Discovery disputes arose between the parties early in the litigation, centering on:

(a) Petitioner-Counsel Smith's refusal to negotiate an order protecting the confidentiality of certain documents Petitioner-Plaintiff Dunkin asked Respondents to produce (including personnel files, medical records, worker's compensation claim files, OSHA files, and other documents which, by policy, were proprietary and confidential); and

(b) Petitioner-Counsel Smith's service of a notice of deposition on Respondents' counsel, six days before the depositions were to commence, identifying 37 deponents (including one who was deceased at the time the notice was served), some by name, others only by category, such depositions "to continue from day to day until completed," without any attempt by Petitioner-Counsel Smith to contact Respondents' counsel to determine his availability or that of any of the deponents.

Because of Petitioner-Counsel Smith's stubbornness and obstreperousness, the fact that Petitioners Dunkin and Smith intended to "go public" with the information discovered on the request for production of documents (App. at 110a), and the fact that Petitioner-Counsel Smith refused to communicate with Respondents' counsel concerning the 37 depositions noticed to proceed following the Fourth of July holiday (which notice was given only six days before the depositions were to commence), Respondents sought protective orders against production of documents absent an appropriate confidentiality order and against the depositions. After hearing argument the district court granted the motions and ordered Petitioner-Counsel Smith (and only Petitioner-Counsel Smith, not Petitioner-Plaintiff Dunkin) to pay

Respondents' attorneys' fees and costs associated with the motions pursuant to Fed. R. Civ. P. 26(c) and 37(a)(4).[2] The court found that Petitioners' opposition to Respondents' request for a confidentiality order was "essentially frivolous" and characterized Petitioner-Counsel Smith's noticing of 37 depositions without any contact with Respondents' counsel as "Rambo litigation tactics and harassment, and harassing litigation tactics." (App. at 114a). The court found that counsel had engaged in a "persistent course of harassment and discovery abuse," (App. at 10a), describing his conduct at one hearing as "obstreperous, obstructionist, non-cooperative, . . . and . . . pettifoggery . . . ." (App. at 117a). The court awarded Respondents fees totalling $4,541.25. (App. at 125a).

The court also ordered Petitioner-Plaintiff Dunkin's discovery to proceed only as approved by, and under the watchful eye of, a Magistrate. The court's order required Dunkin, because of her counsel's "abusive" tactics, among other things to submit a deposition plan to the Magistrate in which Dunkin indicated the name of each proposed deponent, a statement concerning the information counsel proposed to elicit from each deponent and how the information is relevant to the subject matter of the litigation or reasonably calculated to lead to discovery of admissible evidence, and the estimated time required for each deposition. (App. at 124a, 131a-136a).

Petitioner-Plaintiff Dunkin, through her counsel, thereafter filed two deposition plans with the Magistrate, each of which was rejected as not in compliance with the district court's order. She filed a third deposition plan accompanied by approximately 3,000

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2. In the petition for certiorari herein, Petitioners misrepresent that the sanctions were imposed on both plaintiff and her counsel. [Petition for certiorari at 4 ("in connection with the sanctions imposed against Ms. Dunkin and her attorney")].

pages of miscellaneous documents without any explanatory commentary, from which she apparently expected the Magistrate to discern the relevance of the depositions requested. The Magistrate also rejected this third plan, sending it back to Petitioner-Counsel Smith with a direction to relate the documents to the requested depositions if he expected the depositions to be allowed. Petitioner-Plaintiff Dunkin sought reconsideration of this order. She also sought reconsideration of another order entered by the Magistrate restricting the permissible scope of questioning by Petitioner-Counsel Smith on the deposition of Douglas Eddins. (App. 164a-168a).

After oral argument on Petitioner-Plaintiff's motions the district court denied reconsideration. The district court found the motion for reconsideration of the Magistrate's order on the permissible scope of questioning to be frivolous, and awarded Respondents fees and costs associated with responding to the motion pursuant to Local Rule 602C of the United States District Court for the District of Colorado, and alternatively pursuant to Fed. R. Civ. P. 37. (App. at 170a). The fees and costs awarded this second time totalled $1,807.93. (App. at 211a).

Both Petitioners immediately appealed to the Tenth Circuit from the district court's orders awarding fees and costs against Petitioner-Counsel Smith in connection with Respondents' motions for protective order and Petitioner-Plaintiff Dunkin's motion for reconsideration. (Petitioner-Plaintiff Dunkin was named as an appellant below even though no fees or costs were awarded against her, only against her counsel.) The appeals were consolidated for purposes of ruling. After raising the question of jurisdiction *sua sponte* and asking the parties for briefs on the question, the Tenth Circuit dismissed the appeals for lack of jurisdiction based on established circuit precedent that "an order sanctioning counsel currently of record is not appealable before entry of final judgment," either as a final order pursuant to 28

U.S.C. § 1291 or as an appealable collateral order pursuant to *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). (App. at 1a). The Tenth Circuit denied appellants' petition for rehearing and suggestion for rehearing *en banc*. (App. at 215a). Petitioners' petition to this Court followed.

In the meantime, the case below languishes. The case is nearly 18 months old, while Petitioners waste time litigating in every court but the trial court, including two appeals to the Tenth Circuit and the present petition for writ of certiorari, and on every issue but the merits of the case.

REASONS FOR DENYING THE WRIT

Petitioners[3] attempt to interest this Court in granting their petition for certiorari by claiming that the decision of the Tenth Circuit below conflicts both with a decision of this Court and with the decisions of five other circuit courts of appeals. Petitioners' claim of conflict is not well-founded.

It is important first to understand the context in which this petition for certiorari arises. The district court below was

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3. Geana J. Dunkin, plaintiff in the action pending in the district court below, has been named as a Petitioner herein, although the district court imposed sanctions only on David L. Smith, plaintiff's counsel, not on plaintiff. Because she was not sanctioned, Ms. Dunkin lacked standing to appeal in the Tenth Circuit, and similarly lacks standing to petition this Court for a writ of certiorari to the Tenth Circuit. *Riggs v. Scrivner, Inc.*, 927 F.2d 1146 (10th Cir. 1991) (employee's attorney, rather than employee, was party aggrieved by district court's imposition of sanctions against attorney; employee did not have standing to appeal the sanctions). At least four other circuits agree with the Tenth Circuit's position on standing. *See DCPB, Inc. v. City of Lebanon*, 957 F.2d 913, 918 (1st Cir. 1992); *Bartels v. Sports Arena Employees, Local 137*, 838 F.2d 101, 104 (3d Cir. 1988); *Hays v. Sony Corp. of America*, 847 F.2d 412, 414 (7th Cir. 1988); *Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1276 (9th Cir. 1990).

confronted with exceptionally egregious, abusive *discovery* conduct, as revealed by the court's extensive findings following argument on Respondents' motions for protective order and motions for sanctions:

> Mr. Smith, it is my finding, based on the materials in the file, based on the fact that you didn't call Mr. Hedger before scheduling any of these depositions, based on the fact that you have scheduled 34 [sic] depositions to start on July 6th and to "continue during reasonable time periods thereafter until completed at the office of plaintiff's attorney" etc., based on the fact that you won't agree to any confidentiality order with respect to records and personnel files and other files that are properly regarded as private, . . . it is my finding that you are engaged in a persistent course of harassment and discovery abuse.

(App. at 10a). In ruling on Respondents' request for sanctions, the court noted:

> Alright, I am going to make some findings here concerning the background of this case and what leads us to this stage in the litigation, and I am imposing sanctions, and *I am going to grant the award of fees and I am going to grant them against counsel personally.*
>
> * * *
>
> That brings me to the final . . . protective order that was sought, and that was the protective order with respect to no fewer than 37

depositions involving some named as well as unnamed deponents. That deposition notice was filed [by Petitioner-Counsel Smith] on June 30th, 1992. *It is undisputed that plaintiff's counsel did not talk to defendant's [sic] counsel about scheduling those depositions . . .* It is not sufficient under the discovery rules or the local rules, the new rules or the old rules, for counsel to willy-nilly notice 37 depositions on five days' notice, many of those depositions being deponents or people associated with the defendant, and drop that on counsel five days or six days before 37 depositions are scheduled to commence.

There is no written local rule that says that you have to give counsel notice. I acknowledge that. *There is, in my mind, however, no question that that is abusive deposition conduct.*

We hear a lot about Rambo litigation and Rambo litigation tactics and harassment, and harassing litigation tactics. If that is not a harassing litigation tactic, I don't know what is. To not talk to your opposing counsel about scheduling, to drop a deposition notice on June 30th that notices 37 depositions, to not tell opposing counsel whose employees or former employees are being deposed what order those depositions are going to go in, and to include in that notice a bunch of people who aren't even identified in the deposition notice, and then to say that those depositions will continue from day to day thereafter until concluded, which could mean God knows when, would you be

going in August, would counsel have to reserve all of July, would counsel have to reserve the weekends, nobody knows because Mr. Smith didn't bother to talk to him to figure out exactly what the schedule was. So that's why I granted the motion for a protective order, and that brings me to the issue of sanctions.

Ordinarily deposition and discovery rules are supposed to be self-executing. They can be self-executing by and large only if counsel are cooperative and talk to one another and make themselves accessible. Otherwise, it is a miserable process. It is a miserable process for counsel and it is a miserable process for the Court. And the reason it's a miserable process is because — is illustrated by this hearing. We have now spent almost four hours on this matter.

In that situation where conduct such as this has occurred, I believe that it's justified and justifiable to impose certain limitations on the entire discovery process and to impose those limitations not on both parties alike, but on the party or the attorney who is causing the abuse. And *on reviewing the record here, there is no question in my mind, Mr. Smith, that it is your conduct, your obstreperousness and your stubbornness that has caused all of the delay and has caused us to be here for this hearing today.* And that was the reason that I imposed the requirement that you clear all future depositions with the magistrate.

Rather than attempting to comply with this Court's order of July 9th, what you did thereafter is almost a flaunting of the order. *No sooner had you walked out of this courtroom and I walked off the bench, than I received in chambers a copy of the discovery request for the magistrate which requested not only the litany of the same 37 depositions, including a dead man that you'd already been told was dead,* and not only the same request for production of documents, but also every piece of discovery that you had requested and that I had already told that you couldn't have.

* * *

I've listened to you conduct cross-examination, and you can't do it. *I think you're just trying to harass everybody here. I think you're trying to harass Louisiana-Pacific, opposing counsel and the Court.*

That brings me to the question of fees. Your objections, Mr. Smith, to the fee request and your evidentiary objections are *beneath frivolousness.* You have conducted yourself this morning in a way that is *obstreperous, obstructionist, non-cooperative, and if every attorney conducted himself in the way that you have conducted yourself here, the courts, this Court and every court, would be bogged down not in substantive motion practice or substantive issues, we'd be bogged down in pettifoggery because that's what you've been doing all morning, is pettifogging.*

The request for attorney's fees is supported by evidence in the record. $175.00 an hour is undoubtedly a reasonable fee in this community. . . . and 23 hours initially caused me some hesitation. I wondered how Mr. Hedger could have spent 23 hours on the three discovery motions that I've been considering here.

At the conclusion of four hours listening to you argue, Mr. Smith, and talk about these issues, I now understand exactly how he could spend 23 hours on these matters. And I find that 23 hours is an entirely reasonable amount to be spent on these matters . . . .

In addition, your objection that these are not original records in some sense is bewildering, to say the least . . . .

There is absolutely no requirement that he [Mr. Hedger] produce his original notes for your inspection, nor is there any requirement in the cases concerning attorney's fees that the only competent evidence consists of Mr. Hedger's original diary notes which record his time on this matter and all other matters. It is surely proper for him to produce the billing limited to his particular client, and it's surely proper for him to summarize this in an affidavit. So I find that's another frivolous point that you've made.

The reasonable and necessary attorney's fees in the case amount to $4,060.00. *Those attorney's*

> *fees were directly caused by the conduct of the plaintiff's counsel. I find no evidence that the plaintiff has had any involvement herself whatsoever in any of this conduct, so those attorney's fees will be assessed personally against David Smith, the counsel for the plaintiff, and those attorney's fees will be paid no later than July 27th, 1992.*

[App. at 99a, 113a-117a (emphasis supplied)].[4]

Turning to the applicable law, there is no conflict between the decision of the Tenth Circuit and this Court's decision in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *Cohen* established that 28 U.S.C. § 1291 should be given a practical, not a technical, construction, and recognized the existence of a small class of orders that, although not dispositive of the actions from which they arise, nevertheless determine "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. *Cohen* involved the immediate appealability of an order denying a request to post a bond for the expenses of the defense in a shareholder's derivative action. It did not address whether an order such as the orders at issue here, assessing monetary sanctions pursuant to Rule 37 against counsel currently of record for discovery abuses, falls within the "small class of orders" permitted appeal despite their interlocutory nature. That issue has not been addressed by this Court.

Moreover, each of the decisions of the five circuits cited by Petitioners is factually distinguishable from the decision

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4. The court also awarded fees for appearance at the hearing, bringing the total award to $4,541.25. (App. at 125a).

challenged here. The Tenth Circuit denied immediate appellate review of orders sanctioning current counsel of record for repeated and egregious *discovery* abuses *pursuant to Rule 37* of the Federal Rules of Civil Procedure.

In contrast, *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985), cited by Petitioners at page 13 of the petition for certiorari, involved sanctions assessed *not* against current counsel of record, but against *former* counsel no longer involved in the case, and for abuses that violated *Rule 11* of the Federal Rules of Civil Procedure,[5] not discovery abuses sanctionable pursuant to Rule 37. Prior to *Eavenson* the Third Circuit had held that orders sanctioning counsel currently of record for discovery abuses were *not* immediately appealable as collateral orders under *Cohen*. *Eastern Maico Distributors v. Maico-Fahrzeugfabrik*, 658 F.2d 944 (3d Cir. 1981). In *Eavenson* the Third Circuit distinguished *Eastern Maico*, noting the difference between current counsel and former counsel in terms of their connection with the case, and between conduct that related to discovery activity and conduct violative of Rule 11: "Although not dispositive on the appealability issue, it is important to note that the sanctioned conduct here does not relate to discovery activity, *which is typically related to the merits of the underlying litigation*, but, rather, to the district court's perception, *wholly collateral to the merits of the case*, that appellant deliberately disobeyed a court order granting leave to amend a pleading." 775 F.2d at 538 n. 6 (emphasis added). *Eastern Maico* remains good law in the Third Circuit.[6]

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5. Counsel for plaintiff in *Eavenson* was sanctioned for what the district court perceived as willful disobedience of an order of the court allowing amendment of plaintiff's complaint with certain restrictions, by inclusion in the amended complaint of what the court viewed as restricted material. 775 F.2d at 541-544.

6. The Second Circuit also has noted the significance of the rule under which sanctions are imposed. In *Cheng v. GAF Corporation*, 713 F.2d 886 (2d

(Cont'd)

Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985), cited at page 13 of the petition, is similarly distinguishable. It also involved Rule 11 sanctions against counsel of record, not sanctions for discovery abuses.[7]

The same is true of *TMF Tool Co., Inc. v. Muller*, 913 F.2d 1185 (7th Cir. 1990), also cited at page 13 of the petition.[8] *TMF Tool Co., Inc.* is further distinguishable on three grounds: first, the

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(Cont'd)

Cir. 1983), the court allowed appeal of an order imposing sanctions against counsel currently of record pursuant to 28 U.S.C. § 1927. Counsel was sanctioned for his " 'unreasonable and vexatious'" attempts to disqualify opposing counsel. 713 F.2d at 887. The court distinguished the award of sanctions under § 1927 from sanctions for discovery abuses:

> Moreover, we think the fee award in this case is distinguishable from the Rule 37 situation involved in *Eastern Maico* . . . . the propriety of the award here will not be affected by subsequent developments in the case; it is thus unlike an award of fees for frivolous discovery motions, which "may not be completely separable from the merits of the underlying action," *citing Eastern Maico Distributors v. Maico-Fahrzeugfabrik*, 658 F.2d 944 (3d Cir. 1981).

The court went on to say that "we express no opinion on the appealability of sanctions under [Rule 37(a)(4)] against the attorney rather than the party that he represents." 713 F.2d at 890.

7. The district court determined that a position taken by a defendant in a brief in support of a motion for summary judgment was not well grounded in fact. 771 F.2d at 261.

8. The district court determined that plaintiff TMF's counsel either did not research the applicable law regarding a claim brought against defendant Hans Muller, or chose to ignore applicable law when he served the defendant. 913 F.2d at 1187.

Seventh Circuit ruled only that "an order granting . . . monetary sanctions issued *under the provisions of Rule 11* is an appealable decision" — it did not address the appealability of a sanctions order pursuant to Rule 37; second, at the time the sanctions order was entered, "the underlying claims in the complaint had long been dismissed and the [sanctions] order was intended to end the ancillary aspect of the original litigation," 913 F.2d at 1189; and third, the court did not once mention *Cohen* or analyze the appealability of the sanctions order as a collateral order, instead treating the order as a final judgment entered pursuant to Rule 54 of the Federal Rules of Civil Procedure, appealable as a matter of right as a final order pursuant to 28 U.S.C .§ 1291 based on the fact that the sanctions order disposed of the only remaining issue in the case.

The four Ninth Circuit decisions cited by Petitioners, *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548 (9th Cir. 1986), *cert. denied*, 484 U.S. 823 (1987); *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503 (9th Cir. 1987); *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470 (9th Cir. 1988); and *Riverhead Sav. Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109 (9th Cir. 1990) (all cited at page 14 of the petition), also involve Rule 11 sanctions, not sanctions for discovery abuses.[9] *Riverhead Sav.*

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9. In *Unioil, Inc.* the disrict court determined that plaintiffs' counsel had violated Rule 11 in three respects: (1) failing to conduct a reasonable investigation into the facts upon which class allegations were made or into the potential conflict of interest that was inherent in undertaking representation of the class of Unioil shareholders in an action in which Unioil was one of the named plaintiffs; (2) trying to disengage from class discovery without cause and from the class action suit without court approval; and (3) submitting declarations, in opposition to certain motions of defendants, that plainly did not comport with the requirements for statements under oath. 809 F.2d at 553.

In *Rachel v. Banana Republic, Inc.*, the district court found that the inclusion of Banana Republic, Inc.'s parent company, The Gap, was completely lacking in factual basis. 831 F.2d at 1508.

(Cont'd)

Bank is further distinguishable in that the sanctions awarded were assessed against both the defendant and counsel of record, not just against counsel. The court also limited its holding to the specific facts of the case.[10] 893 F.2d at 1114.

The two Eleventh Circuit cases cited by Petitioners, *Ortho Pharmaceutical Corp. v. Sona Distributors*, 847 F.2d 1512 (11th Cir. 1988) and *DeSisto College, Inc. v. Line*, 888 F.2d 755 (11th Cir. 1989), *cert. denied*, 495 U.S. 952 (1990), cited at page 14 of the petition, are Rule 11 cases as well; they do not involve discovery disputes, orders or sanctions.[11] *Ortho Pharmaceutical Corp.* is also distinguishable on grounds that the sanctions in question were awarded against both defendants and their counsel. The court's comment, noted by Petitioners, that a sanctions order, whether against a party and counsel jointly or against counsel alone, is dictum as to sanctions orders against counsel alone.

In *Aetna Life Ins. Co.* the district court sanctioned defendants' counsel for filing what it characterized as a frivolous motion to dismiss. 855 F.2d at 1471.

In Riverhead Sav. Bank defendants *and* their counsel were sanctioned for filing frivolous counterclaims against plaintiffs and a frivolous third party complaint. 893 F.2d at 1111.

10. Specifically, where the sanctions were imposed jointly against a party and counsel and were enforceable prior to entry of final judgment.

11. In *Ortho Pharmaceutical Corp.*, the district court awarded sanctions against one defendant and its counsel for filing a motion to dismiss that defendant for lack of personal jurisdiction that the court characterized as "incompetent from its inception." 847 F.2d at 1514.

In *DeSisto College, Inc.* the district court found that plaintiffs' counsel had filed a complaint against two of the defendants without sufficiently researching the Eleventh Circuit's precedent on legislative immunity. 888 F.2d at 757.

Finally, *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985), is completely inapposite. It does not, as Petitioners state at page 15 of the petition, involve a fee award against former counsel (which would distinguish it in any event), but, rather, a motion filed by a nonparty witness (Richard Helms, former director of the CIA) for costs and attorneys' fees incurred in attending an aborted deposition and in successfully defending CBS, Inc.'s contempt petition arising out of his refusal to submit to the deposition. The district court denied Helms' motion, and Helms appealed. The facts could hardly be more distinguishable.

The central purpose of the finality rule embodied in § 1291 is avoidance of piecemeal litigation, promotion of judicial efficiency, reduction in the cost of litigation, and elimination of the delays caused by interlocutory appeals. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). As this Court noted in *Firestone*, at 374,

> Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

This concern is particularly compelling in cases involving discovery orders, including sanctions orders, which are designed to prevent delay and harassment in the discovery process. To allow immediate appeal of such orders would promote the very delay and harassment they are designed to prevent, as is particularly evident from the facts of this case.

Cohen's progeny, in refining the "*small* class of orders" (emphasis added) warranting immediate review, focus on *Cohen's* admonition that review be limited to claims of right that are "too *important* to be denied review and too *independent* of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen,* 337 U.S. at 546 (emphasis added). *See, e.g., Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978), where this Court stressed the narrow scope of *Cohen,* and that the issue to be resolved on appeal must be "*completely* separate from the merits of the action" (emphasis added). Discovery orders, including orders imposing sanctions for abusive discovery conduct, may and often do implicate the underlying claims in the case, and thus are not completely separate, collateral orders. *Eastern Maico Distributors v. Maico-Fahrzeugfabrik,* 658 F.2d 944, 947 (3d Cir. 1981); *Eavenson, Auchmuty & Greenwald v. Holtzman,* 775 F.2d 535, 538 n. 6 (3d Cir. 1985); *Cheng v. GAF Corporation,* 713 F.2d 886, 890 (2d Cir. 1983).[12] *See also, Borden Co. v. Sylk,* 410 F.2d 843, 845-846 (3d Cir. 1969), where the court correctly and ably articulated the concern that interlocutory appeal pursuant to *Cohen* be strictly limited to issues of importance:

> We have detected what appears to be an irresistible impulse on the part of appellants to invoke the "collateral order" doctrine whenever the question of appealability arises. * * * Every interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against the need for

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12. Not only the courts have suggested a need to distinguish between the type of sanction imposed when considering the propriety of an immediate appeal. At least one commentator has encouraged distinction between the type of sanction imposed when considering whether a sanctions order should be allowed immediate appeal. Lawrence R. Kemm, *Interlocutory Appeal of Attorney Sanctions: In Search of a Standard,* Vol. 25 Indiana L. Rev. 919 (1992).

> efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal appellate litigation. * * * *The present case, filed over three years ago and now held in abeyance pending the outcome of this appeal, is a splendid example of the Homeric proportions that such litigation can assume. Our over-burdened courts have little time or appetite for such protractions.* (emphasis added).

Other circuits have stressed repeatedly the short reach of *Cohen* and the need to apply its doctrine "parsimoniously." *See* cases cited in Wright & Miller, *Federal Practice and Procedure* § 3911 at n. 64 (West 1992).

This case is fast reaching the "Homeric proportions" that so concerned the Third Circuit in *Borden Co., supra*. It is Petitioner-Counsel Smith, not the Tenth Circuit or the district court, who has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of the court's power of supervision. Exercising its power of supervision is exactly what the district court did in imposing sanctions on Mr. Smith for his abusive discovery conduct. District courts must be allowed to police such abuse without the specter of interlocutory appeal hanging over them.

Petitioners also suggest that this Court should issue a writ of certiorari to the Tenth Circuit to review the circuit court's routine determination that Petitioners' two appeals to that court were frivolous, and thus subject to sanction pursuant to Rule 38 of the Federal Rules of Civil Procedure. (Rule reproduced in Appendix at 219a). The appeals were taken in the face of recent, clear circuit precedent prohibiting such appeals. The Tenth Circuit determined that the appeals did not present good faith arguments for the

reversal of existing law, in accordance with Tenth Circuit Local Rule 46.5. (Rule reproduced in Appendix at 220a). Nothing in this unremarkable factual determination by the Tenth Circuit warrants review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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